

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**DICK L. POFF**

Claimant

VS.

**IBP, INC.**

Self-Insured Respondent

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Docket No. 247,591

**ORDER**

Claimant requested review of the August 22, 2003 Award by Administrative Law Judge Brad E. Avery. The Board heard oral argument on January 20, 2004.

**APPEARANCES**

Scott L. Johnson of Topeka, Kansas, appeared for the claimant. Gregory D. Worth of Roeland Park, Kansas, appeared for self-insured respondent.

**RECORD AND STIPULATIONS**

The Board has considered the record and adopted the stipulations listed in the Award.

**ISSUES**

The claimant filed four separate workers compensation claims alleging work-related injuries on four separate dates to four different parts of his body.<sup>1</sup> Although all four claims were heard at one regular hearing, the Administrative Law Judge (ALJ) conducted the hearing so that all the evidence pertaining to one claim was heard and terminal dates were established before the hearing proceeded with the evidence pertaining to the next claim. The ALJ then issued four separate awards.

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<sup>1</sup> Docket No. 233,909 alleging bilateral carpal tunnel syndrome; Docket No. 247,591 alleging varicose veins in both lower extremities; Docket No. 250,093 alleging injuries to the back, hands and fingers; and, Docket No. 270,756 alleging hearing loss in both ears.

In this case, the claimant alleged that lifting and standing on concrete at work caused the varicose veins in both of his legs. The ALJ found the claimant's varicose veins were aggravated by his employment with the respondent and awarded claimant a 4 percent permanent partial disability to the body as a whole.

The claimant requests review of the following issues: (1) whether the ALJ erred in separating each of claimant's claims rather than considering all of the claims and entering a single award for the cumulative disability; (2) whether the ALJ erred in determining claimant was receiving retirement benefits and therefore applying the offset provisions of K.S.A. 44-501(h); and, (3) the nature and extent of claimant's disabilities. Claimant contends that the cumulative effect of all his injuries suffered working for respondent has rendered him permanently and totally disabled.

Respondent argues the claimant failed to meet his burden of proof that he suffered accidental injury arising out of and in the course of his employment. Respondent argues that the varicose veins in claimant's legs are a personal condition which results from the natural aging process and normal activities of day-to-day living. Consequently, the respondent argues the ALJ's Award should be reversed and compensation denied. Respondent further argues the claimant filed four separate and distinct claims and that there is no basis to enter a single award determining the cumulative effect of all four distinct and separate injuries. Consequently, respondent requests the Board to likewise determine each claim separately. Lastly, respondent argues that it is entitled to a retirement offset if claimant is awarded a work disability.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant testified that he began having problems with pain in both legs but he was unsure when he first began to have symptoms. But he testified that while at work the captive standing in one position would cause pain in his legs and likewise after he would sit on the stool for a period of time the pain in his legs would again increase.

The medical evidence indicates that claimant was referred to Dr. Joseph E. Bosiljevac Jr. on April 13, 1999, for examination of skin lesions but while in the doctor's office claimant also complained of swelling and pain in his legs. Consequently, Dr. Bosiljevac conducted an examination and evaluation of that condition and diagnosed claimant with varicose veins.

Dr. Bosiljevac ultimately recommended claimant undergo stripping of the worse veins in both legs. The greater saphenous vein in each leg was removed. The procedure was performed on the claimant's left leg on August 10, 1999, and on claimant's right leg

on August 24, 1999. After the surgery the doctor noted improvement in claimant's condition and determined claimant should wear knee high Jobst stockings to facilitate circulation in his legs. The doctor felt that the knee high support stockings would control the remainder of claimant's symptoms.

On October 20, 1999, claimant was given a full release with a limitation of standing no more than four to six hours per day. The doctor noted that if claimant was able to alternate sitting and standing he could perform a job for eight hours a day. At his last office visit in May 2000, the claimant complained of weakness in his legs but, after an arterial exam, Dr. Bosiljevac concluded that his symptoms were not due to venous insufficiency.

It should be noted that claimant had been performing the job washing tails before his first office visit with Dr. Bosiljevic and had been provided a stool to sit on in order to alternate sitting and standing while he worked. Claimant continued performing that job upon his release and until he terminated his employment on June 29, 2000. Lastly, the doctor noted that he told claimant to return if he had more trouble with his legs and that claimant had not contacted the doctor since the last follow-up visit in May 2000.

It is well settled in this state that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction.<sup>2</sup> Drs. Bosiljevac, Bieri, Swaim and McKinney all agreed that claimant's work activities for respondent aggravated his varicose veins. The court-ordered independent medical examiner, Dr. Bieri, concluded that standing in a captive position at work for long periods of time as well as sitting on a stool without a footrest for long periods of time aggravated the varicose veins. The doctor testified:

Q. If he had to work in a captive position and prolonged standing and he had varicose veins, would it be more probable than not that that would aggravate his condition?

A. I believe so.

Q. If one has to work in a captive position standing, what would that do as far as putting stress on his muscles and his circulatory system, if anything?

A. It would compromise the circulation.

Q. And would that make him more susceptible of aggravating a preexisting condition of varicose veins?

A. Yes.

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<sup>2</sup> *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976); *Harris v. Cessna Aircraft Co.*, 9 Kan. App.2d 334, 678 P.2d 178 (1984).

Q. If he had to sit for prolonged periods of time on a steel stool where he could not rest his legs on the concrete floor, would that more probably than not aggravate his condition of varicose veins?

A. You mean dangling his legs?

Q. Dangling his legs, yes.

A. I believe so.<sup>3</sup>

Dr. Bosiljevac agreed that captive positioning would aggravate the varicose vein condition and cause a permanent worsening. The doctor testified:

Q. Would it be fair to say, Doctor, that Mr. Poff is going to have this varicose vein problem regardless of whether he was working at IBP or somewhere else so long as he was up and about with his legs below the level of his heart?

A. The only comment I would make there is the muscle pump when someone is walking or able to move on the legs helps to empty the veins. So in situations where a person is standing in one position or sitting in one position and not getting up and walking much, that may aggravate.

Q. And when you say aggravate is that going to be a temporary aggravation where the blood pools for a time before they become active again and move on so that he might have some pain associated with that versus a permanent worsening of his condition?

A. Well, I think a combination of both. The prolonged stasis that occurs from the nonmovement of the leg would cause some acute symptoms but also contribute little by little to long-term damage.

Q. And again, any time someone was stationary, be it at work or anywhere else, this is the problem they're going to have over time?

A. Yes.<sup>4</sup>

On cross-examination the doctor reiterated:

Q. And he's also testified that he felt that his condition was a result of his being required to stand in a captive position for a number of hours at a time and would that be reasonable to assume that on his part?

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<sup>3</sup> Bieri Depo. at 83-84.

<sup>4</sup> Bosiljevac Depo. at 24-25.

Mr. Worth: Are you referring to his varicose vein condition being caused by standing?

By Mr. Tilton:

Q. Yes, and pain in his legs being in a captive position.

A. That would aggravate varicose vein or venous insufficiency problem.

Q. Over a period of time would that be a result of worsening of his condition if he's required to do that?

A. Yes.

Q. He's testified that since he quit working and can walk that that has lessened his pain; does that sound reasonable?

A. Yes.

Q. In his legs, I'm sorry. Okay. Would, if the fact that he could sit and his legs had to dangle down if they had to be in that position for a long period of time and he would not be able to walk, would that also tend to aggravate his vein, vein insufficiency in his legs?

A. Yes.<sup>5</sup>

The doctor again concluded that the aggravation factor was because his legs were below the level of his heart.

The Board affirms the ALJ's determination that claimant has met his burden of proof to establish that his work activities aggravated the varicose vein condition in his legs.

Respondent argues that Dr. Bosiljevac's testimony establishes that the varicose vein condition was progressive and occurred anytime that claimant's legs were below the level of his heart. As claimant's legs would be below the level of his heart whether at work or not, respondent argues claimant's condition was caused by activities of daily living.

K.S.A. 1998 Supp. 44-508(d) defines "accident":

Accident means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate

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<sup>5</sup> Bosiljevac Depo. at 33-34.

the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment.

K.S.A. 1998 Supp. 44-508(e) defines “personal injury” and “injury”:

“Personal injury” and “injury” mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker’s usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence. An injury shall not be deemed to have been directly caused by the employment where it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living.

The foregoing statute, which defines “injury” excludes “normal activities of day-to-day living” from being found to have been caused by the employment.

The Board has concluded that the exclusion of normal activities of day-to-day living from the definition of injury was an intent by the Legislature to codify and strengthen the holdings in *Martin*<sup>6</sup> and *Boeckmann*.<sup>7</sup> But claimant’s injury in this case is distinguishable from both *Martin* and *Boeckmann*. While standing or sitting with the legs below the heart is an activity which admittedly occurs whether at the workplace or not, being in a captive position on a production line is not. The Court in *Boeckmann* distinguished cases in which “the injury was shown to be sufficiently related to a particular strain or episode of physical exertion” to support a finding of compensability.<sup>8</sup> The Board concludes that the Legislature did not intend for the “normal activities of day-to-day living” to be so broadly defined as to include injuries caused or aggravated by the strain or physical exertion of work.

It is clear from the record that claimant aggravated and worsened his varicose vein condition in both legs because his work required captive standing or sitting on a stool in a captive position at the production line during the course of an eight-hour workday. Although Dr. Bosiljevac noted that the varicose vein condition would progress whenever claimant’s legs were below the level of his heart, he also agreed that such work-related captive positioning would worsen that condition. In contrast, when engaging in everyday activities with the legs below the heart, claimant would be able to move and not stand in the same position for an extended period of time. And Dr. Bosiljevac noted that even minimal movement helps ameliorate the varicose vein condition.

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<sup>6</sup> *Martin v. U.S.D. No. 233*, 5 Kan. App. 2d 298, 615 P.2d 168 (1980).

<sup>7</sup> *Boeckmann v. Goodyear Tire & Rubber Co.*, 210 Kan. 733, 504 P.2d 625 (1972).

<sup>8</sup> *Id.* at 737.

From the record provided, the Board concludes claimant has met his burden of proving that the work activities he performed for respondent aggravated, intensified or accelerated his preexisting varicose vein condition to a degree greater than the natural aging process and the normal activities of daily living. Accordingly, the aggravation of the varicose veins was a new and distinct injury, which arose out of and was directly caused by claimant's employment.

At his attorney's request, the claimant was examined by Dr. Truett L. Swaim on June 19, 2001. The doctor opined that because of claimant's varicose vein abnormalities he suffered a 7 percent permanent partial functional impairment to each lower extremity which converted to a 3 percent whole person impairment for each lower extremity. The ALJ ordered an independent medical examination of claimant by Dr. Peter V. Bieri. Dr. Bieri opined that because of venous insufficiency, the claimant suffered a 10 percent permanent partial functional impairment to each lower extremity which converted to a 4 percent whole person impairment for each lower extremity.

The ALJ concluded that Dr. Bieri's opinion was the most persuasive and the Board is not persuaded to disturb that decision. However, the ALJ incorrectly determined that Dr. Bieri had rated claimant's bilateral venous insufficiency at 4 percent. As previously noted, Dr. Bieri determined claimant suffered 4 percent whole person impairment for each lower extremity which combine for an 8 percent permanent partial whole body functional impairment. Consequently, the ALJ's Award will be modified to reflect claimant suffered an 8 percent permanent partial whole person functional impairment.

The claimant alleged the cumulative effect of all four claims is that he is now permanently and totally disabled. And claimant also argues that in this particular case Dr. Swaim's restrictions that claimant be able to lay down and elevate his legs on an as-needed basis renders him essentially unable to engage in substantial and gainful employment.

The parties stipulated to an accident date of April 13, 1999. After the vein stripping surgeries, the claimant returned to his work with respondent and continued working for a little over a year. The treating surgeon, Dr. Bosiljevac gave the claimant a full release on October 20, 1999, with a limitation of standing no more than four to six hours per day. The doctor noted that if claimant was able to frequently alternate sitting and standing he could perform a job for eight hours a day. The court ordered independent medical examiner noted that claimant remains capable of performing substantial and gainful employment of a sedentary nature.

The Board concludes claimant has not met his burden of proof that he is permanently and totally disabled as a result of his varicose vein condition in his legs. The Board is not unmindful of the contrary testimony of Dr. Swaim and Mr. Dreiling but finds the testimony of the court-ordered independent medical examiner, Dr. Bieri more persuasive. Moreover, Dr. Bosiljevac stated that moving the lower extremities combined

with wearing the Jobst stocking was good for claimant's varicose vein condition. It is significant to note that the treating surgeon, Dr. Bosiljevac never imposed work restrictions requiring claimant to lay down and elevate his leg as suggested by Dr. Swaim. And it was those restrictions which Mr. Dreiling primarily focused upon in offering his conclusion.

Lastly, it should be noted that the offset in K.S.A. 44-501(h) is not applicable to reduce the compensation benefits to less than the compensation benefit payable for claimant's percentage of functional impairment. Because claimant's permanent partial disability compensation in this case is limited to his functional impairment any issues regarding retirement offsets are moot.

### **AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Brad E. Avery dated August 22, 2003, is modified to reflect claimant suffered an 8 percent permanent partial whole person functional impairment and affirmed in all other respects.

The claimant is entitled to 4.86 weeks of temporary total disability compensation at the rate of \$253.35 per week or \$1,231.28 followed by 33.2 weeks of permanent partial disability compensation at the rate of \$253.35 per week or \$8,411.22 for a 8 percent functional disability, making a total award of \$9,642.50, which is due, owing and ordered paid in one lump sum less amounts previously paid.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of February 2004.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER



c:     Scott L. Johnson, Attorney for Claimant  
       Gregory D. Worth, Attorney for Respondent  
       Brad E. Avery, Administrative Law Judge  
       Paula S. Greathouse, Workers Compensation Director